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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-

ALTON BOX BOARD COMPANY, *et al.*,

Petitioners,

v.

THREE J FARMS, INCORPORATED, *et al.*, in behalf of themselves and all other parties similarly situated and circumstanced,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners,

v.

THREE J FARMS, INCORPORATED, *et al.*, in behalf of themselves and all other parties similarly situated and circumstanced,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The forty petitioners herein* respectfully pray that a writ of certiorari issue to review the opinion and decree of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 9, 1979.

* The petitioners, who are all of the defendants in this action, are the following: Alton Box Board Company, Boise Cascade Corporation, Champion International Corporation, The Chesapeake Corpora-

(footnote continued on next page)

Opinions Below

The opinion of the Court of Appeals for the Fourth Circuit, not yet reported, appears as Appendix A. The order of October 26, 1978 of the United States District Court for the District of South Carolina, unreported, appears as Appendix B. The opinion and order of November 28, 1978 of the District Court for the District of South Carolina, unofficially reported at 1979-1 Trade Cas. (CCH) ¶ 62,423 (D.S.C. November 29, 1978), appears as Appendix C.

Jurisdiction

The decree of the United States Court of Appeals for the Fourth Circuit was entered on November 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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tion of Virginia, Consolidated Packaging Corp., Container Corporation of America, The Continental Group, Inc., Corco, Inc., Crown Zellerbach Corporation, Diamond International Corporation, Dura-Containers, Inc., Fibre Box Association, Fibreboard Corporation, Georgia-Pacific Corporation, Green Bay Packaging, Inc., Hoerner Waldorf Corporation, Inland Container Corporation, International Paper Company, Interstate Container Corporation of New York, Longview Fibre Company, MacMillan Bloedel, Inc., Menasha Corportation, Mr. Ennis McCarter, Olinkraft, Inc., Owens-Illinois, Inc., Packaging Corporation of America, Mr. Tim Poffenbarger, Potlach Corporation, St. Joe Paper Company, St. Regis Paper Company, Southwest Forest Industries, Inc., Stone Container Corporation, Union Camp Corporation, U.S. Corrugated Fibrebox Co., Westvaco Corporation, Weyerhaeuser Company, Willamette Industries, Inc., and Western Kraft East, Inc.

Additional respondents are U.S. Textile Corporation, Shapiro & Son Bedspread Corp., and Troy H. Cribb & Sons, Inc.

Questions Presented

1. Does fundamental fairness require that removing parties be provided the right to present their factual and legal positions on removal before remand to state court can occur pursuant to 28 U.S.C. § 1447(c)?

2. Does a district court have inherent powers to fulfill its assurance to litigants regarding the conduct of proceedings before it, by recognizing as void an order entered prior to giving a party a previously promised opportunity to be heard?

3. Should an appellate court sitting in a mandamus proceeding accept the undisputed factual finding of the district court that it had inadvertently denied the removing parties an opportunity to be heard in opposition to remand, and not substitute its own *de novo* findings?

Petitioners submit that each of these questions should be answered in the affirmative.

Statutory Provisions and Rule Involved

28 U.S.C. § 1447(c) and (d), and Rule 60(b) of the Federal Rules of Civil Procedure appear as Appendix D.

Statement of the Case

This petition arises from the issuance of a writ of mandamus by the United States Court of Appeals for the Fourth Circuit directing that a case removed to the United States District Court for the District of South Carolina be

remanded to state court. The court of appeals held that 28 U.S.C. § 1447(d) prohibits a district court from declaring an order of remand "null and void as of the date of issue" even where the district court takes such action because it finds, after a hearing, that the removing parties were inadvertently denied their right to be heard in opposition to remand. The district court took this remedial action because petitioners relied on the district court's assurance that they could submit their position on removal at a later date and thus had not yet advanced their factual and legal arguments against remand when the district court, inadvertently overlooking this assurance, entered an order of remand.

The complaint in this case followed the filing of approximately fifty similar complaints throughout the United States alleging federal antitrust violations in the sale of corrugated containers and corrugated sheets. These cases, most of which were commenced as class actions, had been consolidated by the Judicial Panel on Multidistrict Litigation ("Panel") in the United States District Court for the Southern District of Texas, Houston Division, as *In re Corrugated Container Antitrust Litigation,* M.D.L. 310. *See* 441 F. Supp. 921 (J.P.M.L. 1977).* The instant action was commenced in South Carolina state court almost a year and a half after the first federal complaints were filed. Respondents' complaint, copied from these federal complaints, includes the same allegations and names as defendants all

* On September 6, 1978, the district court in Texas certified a nationwide class of purchasers of corrugated containers and sheets. *In re Corrugated Container Antitrust Litigation,* 80 F.R.D. 244 (S.D. Tex. 1978). As the court of appeals found, respondents here "concededly are members of the class certified in the multidistrict litigation." (Appendix A at A3.)

but one of the thirty-eight defendants named in the federal complaints. (*See* Appendix C at A16, 20.)

Petitioners removed this case to federal court pursuant to 28 U.S.C. § 1441(b) and (c) on the basis of federal question and diversity jurisdiction. In conformity with its prior rulings, the Panel conditionally transferred this case to the Southern District of Texas to become part of M.D.L. 310.* Without disputing that the issues in this and the multidistrict proceedings are identical, respondents opposed a final order of transfer, insisting on pursuit of duplicative action in state court.

On August 16, 1978, respondents moved to remand this case to state court. Immediately thereafter, petitioners moved the district court to stay the proceedings pending the Panel's ruling on transfer. Petitioners' papers made clear that they stood ready to brief the remand issue, but that, in accordance with Panel precedent, they believed that the transferee court was better situated to rule on the remand motion.**

* In anticipation of these transfer proceedings, the parties had stipulated to an order by which the time for petitioners to respond to the complaint was extended until 30 days after the decision of the Panel on transfer to M.D.L. 310.

** *See, e.g., In re Professional Hockey Antitrust Litigation,* 369 F. Supp. 1117 (J.P.M.L. 1974); *In re Air Crash Disaster at Florida Everglades on December 29, 1972,* 368 F. Supp. 812 (J.P.M.L. 1973); *In re Air Crash Disaster at Juneau, Alaska, September 4, 1971,* 360 F. Supp. 1406 (J.P.M.L. 1973); *In re Multidistrict Civil Antitrust Actions Involving Antibiotic Drugs,* 299 F. Supp. 1403 (J.P.M.L. 1969). *See also* 1A Moore's Federal Practice ¶ 0.157 [10.-2], at 134 n.10 (2d ed. 1979). As a practical matter the papers that petitioners would have filed with the district court in Texas in opposition to remand would have differed substantially from the papers submitted in the South Carolina district court because the Texas court, unlike the South Carolina court, was totally familiar

(footnote continued on next page)

Petitioners' response to the remand motion was due soon after their stay papers were filed. Accordingly, petitioners inquired of the court as to whether a ruling on the stay motion would occur first or whether petitioners should file their papers supporting removal on the response date called for under the court's rules. The district judge advised that he would decide the stay motion before the remand motion, and that petitioners did not need to file their papers opposing remand until after the decision on the stay. (*See* App. 84-88 and p. 7 *infra.*)*

Despite this assurance, and without previously having ruled on the stay motion or otherwise having given any notice to the parties, the court entered an order on October 13, 1978 simultaneously denying the stay motion and granting the motion to remand.** Upon being reminded of its

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with the relevant and complex background of the multidistrict proceedings. That background was essential to petitioners' arguments regarding the federal nature of respondents' claims and respondents' fraudulent joinder of parties to defeat diversity, factors upon which the district court ultimately based its decision denying remand. This background was also essential to petitioners' alternative request for an injunction in the nature of a bill of peace, a request which the district court did not reach. (Appendix C at A14, 20-25.)

* Citations such as "App. 84-88" are references to the Joint Appendix filed in the court of appeals.

** Respondents immediately took actions in the South Carolina Court of Common Pleas potentially disruptive of the federal multidistrict proceeding. Respondents obtained an *ex parte* order which would have enjoined settlements from going forward in the federal court in Texas, and also sought duplication in South Carolina of the massive discovery program being conducted in the federal action. The injunction was particularly significant since the federal court is currently considering final approval of an unprecedented $300 million in settlements undertaken by a majority of defendants in M.D.L. 310 to settle all federal and state claims of the class members, including respondents. If the case were to be remanded, respondents would presumably pursue their efforts to utilize a state court injunction in an attempt to disrupt the settlements.

assurance at a hearing held shortly after this order was entered, the court acknowledged its inadvertent failure to hear petitioners in opposition to remand,* and accordingly

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* The transcript of the hearing held by the district court on October 25, 1979, described the circumstances under which the October 13 order was entered:

> "Mr. Wyche [Defendants' Counsel]: [W]e filed a motion for a temporary stay of the proceedings in this Court, and also asked in that motion for an extension of time to file our brief on the remand question. This was on August 29. At the same time I wrote the court requesting an interim extension of time for the brief until you decided the stay motion. I stated that I would call your Clerk or Secretary on Wednesday about this request for briefing, extending the time to brief. I did call your office and ended up talking to Your Honor.
>
> My understanding from that conversation is that we would not file the brief until you got around to consideration of the stay motion, which you said would be at least two or three weeks because of your busy schedule.
>
> Plaintiffs' counsel was advised of this extension within the next couple of days, and thereafter all of the separate counsel, some 39 law firms all over the country were notified in writing [that the brief] would not be due until you had acted on the pending motion for a temporary stay. . . .
>
> The Court: Well, let me cut some of this, Mr. Wyche. The problem was that I received a notice from the Multi-District Panel that they were going to meet, I believe, on the First day of November in Jacksonville. And I thought if the motion for remand was going to be acted on it had to be acted on before the Multi-District Panel met. Once the Multi-District Panel has sent the thing somewhere, or has acted on the motions before it I'm not sure what my jurisdiction would be. So, I felt when I received the notice from the Multi-District Panel that it was going to meet in Jacksonville that I had to do something or I was was going to create a great deal of confusion in Jacksonville; so I prepared the order. If I prepared it without your brief I apologize; if you have the brief, if you will submit it I will consider it. But the reason for my moving was purely a time problem that the whole case had fallen into because of the scheduled appearance of all you people in Jacksonville.
>
> Mr. Wyche: Well, Your Honor, we understand that, and I think that gets right to the heart of what we are here for. What we would like to do; to ask the Court to do is find just what you said, which we conceive to be an inadvertent issuance of the order without our having the opportunity to be heard.

(footnote continued on next page)

recognized the remand order to have been null and void as of the date of issue.

The court on October 26, 1978, therefore entered an order which stated in part:

> "It appearing to the Court that the Order of October 13, 1978 was entered by mistake and inadvertence without the opportunity for the defendants to be heard on the issues relating to plaintiffs' motion to remand this action to the Court of Common Pleas for Spartanburg County, South Carolina:
>
> IT IS HEREBY ORDERED that this Court's Order of October 13, 1978 is hereby declared to have been null and void as of the date of issue. . . ." (Appendix B at A10.)

After then hearing petitioners on the remand motion itself—the first time they set out their factual and legal positions in support of removal—the district court found for petitioners and denied the remand motion on November 28, 1978. (*See* Appendix C.) The district court found

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And then I would like, if you do so concur that that's an accurate statement of the situation, that it was with no fault or neglect on our part, then I would like for you to hear from our associate counsel on what can be done to address themselves to the procedures that may be part of the—to rectify the technical problem that has been created.

The Court: All right, I'll listen to that.

Mr. Wyche: This is Cliff Potter, Your Honor.

The Court: All right, sir, Mr. Potter.

* * *

Mr. Potter [Defendants' Counsel]: Your Honor, based upon what we believe has occurred and what I think the record has demonstrated, and Your Honor has agreed, there really has been inadvertently a denial of the Defendants' opportunity to present their arguments relative to this—.

The Court: All right. I agree with that. . . ." (App. 84-88.)

that the case had been properly removed since the complaint, when correctly examined, stated an independent federal claim as well as one under state law, and also presented at least one separate and independent claim within the federal diversity jurisdiction. (Appendix C at A20-25.)

Respondents appealed from the order of the district court denying remand.* The Fourth Circuit, treating the appeal as a petition for a writ of mandamus, held that the district court was powerless to take the remedial action of recognizing its October 13 order to have been null and void *ab initio*. The court of appeals did not reach the merits of the removal, and therefore did not question in any manner the findings and conclusions in the November 28 order that the case had been properly removed.

Reasons for Granting the Writ

This case presents a fundamental issue of procedure under 28 U.S.C. § 1447: must a removing party's legal and factual positions be heard prior to a determination of a remand motion? The ruling of the court of appeals in this case now stands as precedent to deny any meaningful right to be heard prior to remand. Accordingly, petitioners respectfully submit that this ruling should not be permitted to stand unreviewed.

Although the right of both sides to be heard before a judicial decision is made is a fundamental precept in all

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* Respondents had not sought appellate review of the October 26 order when it was entered. Instead, they indirectly sought such review in an untimely manner only after the district court subsequently denied their remand motion.

contexts, it is particularly crucial in removed actions, where the district court, pursuant to the prohibition against review of a remand order contained in section 1447(d), is the court of first and last resort. This Court should ensure that this fundamental right to be heard is not abrogated.

Beyond the fundamental right to be heard, there are exceptional factors which support a district court's authority to recognize a remand order as null and void. A district court must retain the power to remedy what it recognizes as a mistaken and inadvertent denial of procedural fairness, especially when such denial results from the failure of the court to fulfill an assurance to the litigants concerning the conduct of its own proceedings. No statute, including section 1447(d), should be read to create exceptions to that power. The holding of the court of appeals so radically and unjustifiably curtails the power of the district courts to do justice and so adversely affects the conduct of judicial proceedings as to render appropriate the exercise of this Court's supervisory power.

In addition, the ruling of the court of appeals involves an improper expansion of the appellate function. The factual findings by the district court that there had been inadvertence on its part, and that such inadvertence resulted in a denial of petitioners' right to be heard, are not subject to *de novo* determination by the court of appeals. The Fourth Circuit's reconstruction of the record below, aside from being factually incorrect, was an improper extension of appellate jurisdiction.

1. Fundamental fairness requires that petitioners be provided with the right to present their factual and legal positions on removal before remand can occur.

The record demonstrates that petitioners were denied, albeit inadvertently, an opportunity to present their factual and legal positions in opposition to respondents' motion to remand, and the district court so found. By holding that such a denial was immaterial, the decision of the court of appeals directly conflicts with prior decisions of this and other courts recognizing that removing parties must be afforded the right to be heard in opposition to a motion to remand an action to state court, particularly since the burden of proof is on the removing party and there is no appellate right available. Denial of this right to be heard is a substantial violation of fundamental fairness.

That defendants who remove actions to federal court have the right to be heard in opposition to a motion to remand has been clear at least since *Wilson* v. *Republic Iron & Steel Co.,* 257 U.S. 92 (1921). There this Court stated that upon a motion to remand "the issues so arising must be heard and determined by the District Court . . . and at the hearing the petitioning defendant must take and carry the burden of proof . . . ." *Id.* at 97. More recently, in *O'Bryan* v. *Chandler,* 496 F.2d 403, 411 n.7 (10th Cir.), *cert. denied,* 419 U.S. 986 (1974), the Court of Appeals for the Tenth Circuit restated this imperative: "If plaintiff contests by a motion to remand the defendant's assertions . . . the district court must hold a hearing to determine the jurisdictional issues."

Similarly, the Court of Appeals for the Ninth Circuit has recognized this right to be heard in the context of the

removal to federal court of a criminal prosecution pursuant to 28 U.S.C. § 1443:

> "The district court failed to give petitioner notice of the proposed dismissal and an opportunity to present his arguments in opposition. It thereby deprived him of the 'essence of our judicial system'—'the right to a hearing on the merits of a claim over which the court has jurisdiction.' " *California* v. *Pobuta,* 437 F.2d 1200 (9th Cir. 1971) [citations omitted.]

Accord, Smith v. *City of Jackson,* 358 F.2d 705 (5th Cir. 1966).*

These cases, which deal with the question of a right to be heard on motions to remand, merely reflect the general principles of our jurisprudence that guarantee the right to be heard on important matters in a judicial proceeding:

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' *Baldwin* v. *Hale,* 1 Wall. 223, 233. *See Windsor* v. *McVeigh,* 93 U.S. 274; *Hovey* v. *Elliott,* 167 U.S. 409; *Grannis* v. *Ordean,* 234 U.S. 385. It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo,* 380 U.S. 545, 552." *Fuentes* v. *Shevin,* 407 U.S. 67, 80, *reh. denied,* 409 U.S. 902 (1972).

The court of appeals implied in its opinion in this case that these requirements were satisfied by the service upon

* *Cf. Davis* v. *Superior Court of California,* 464 F.2d 1272 (9th Cir. 1972); *North Carolina* v. *Grant,* 452 F.2d 780 (4th Cir. 1972).

petitioners of the motion to remand. (Appendix A at A8.) Fundamental fairness, however, obviously requires more:

> "The law is, and always has been, that whenever notice . . . is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose . . . ." *Windsor* v. *McVeigh,* 93 U.S. 274, 278 (1876).

Unless a reasonable opportunity is given to persuade the court of the correctness of a party's position, notice is an empty gesture. Notice alone is particularly meaningless where, as here, petitioners carried the burden of persuasion on the removal question. *Wilson* v. *Republic Iron & Steel Co.,* 257 U.S. 92 (1921).*

The court of appeals' reliance upon the finality provision of 28 U.S.C. § 1447(d) was wholly misplaced as a purported basis for overturning the district court's recognition that the October 13 remand order, which resulted from a denial of petitioners' right to be heard, was null and void. Rather, that statute, which accords to district court remand orders a degree of finality that is highly uncommon in our judicial system, provides even further support for the conclusion that a party opposing remand *must,* as the case law recognizes, be given an opportunity to be heard before such an irrevocable action may be taken by the court. That such

* In fact, petitioners did *not* receive notice that their papers in opposition to remand were to be filed prior to the issuance of the remand order on October 13. Petitioners acted upon the "notice" given them by the motion to remand by filing a motion for a stay of proceedings in the district court. The assurance by the district judge that no papers opposing remand had to be filed until the stay matter was resolved surely eliminated any further obligation to act upon the "notice" given by the mere filing of respondents' remand motion, until such time as the court gave petitioners further notice. No such notice was ever given to petitioners, however, since the October 13 order simultaneously denied the motion for a stay and granted the remand motion. (App. A at A3.)

a right is crucial is strikingly evidenced by the facts of this case: once petitioners were given their promised opportunity to present their factual and legal positions to the district court, the court concluded, for several reasons, that the case had been properly removed.* Congress, in enacting the finality provision in section 1447(d), could not have intended that provision to deprive litigants of their right to be heard in opposition to a motion to remand. The decision of the court of appeals, however, would countenance just such a result.**

The district court recognized the fundamental principles of fairness and justice that underlie the precedent that parties opposing remand must be heard before an order can be entered irrevocably depriving them of important removal rights. The court of appeals' decision, if allowed to stand, would undercut greatly the application of these principles, and would establish the doctrine that the removal right can be defeated merely by an inadvertent, albeit serious, judicial error. Petitioners submit that this result would be such a departure from precedent and from the accepted and usual course of judicial proceedings that this Court should act to correct the court of appeals' error.

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* The district court recognized that its October 13 order was made in a factual vacuum. Indeed, as it observed, it was only after the October 13 order that "the factual background of the Corrugated Container Antitrust Litigation [was] made available to the Court." (Appendix C at A14.)

** The court of appeals also misconstrued this Court's reasoning in *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U.S. 336 (1976), in which it was held that 28 U.S.C. § 1447 is not an absolute bar to review of all remand orders. Neither *Thermtron* nor *Gravitt* v. *Southwestern Bell Telephone Co.,* 430 U.S. 723 (1977), the two most recent cases in which this Court has construed section 1447(d), addressed the important issues presented in this case concerning basic procedural fairness in the entry of a remand order.

2. A district court has inherent power to fulfill its assurance to litigants regarding the conduct of proceedings before it, by recognizing as void an order entered prior to giving a party a previously promised opportunity to be heard.

Beyond the fundamental right to be heard, petitioners also had the right to rely on the assurance by the district court that their factual and legal positions in opposition to remand would be heard in due course in accordance with the court's wishes. But for the court's assurance, petitioners would have filed their papers in opposition to remand prior to October 13. When the district judge was informed that he had overlooked his assurance and thereby had entered a remand order prior to petitioners' being heard, he immediately acted to protect petitioners' reliance by recognizing his October 13 order to have been void. The court of appeals, however, refused to recognize the district court's authority to so act and its decision, if permitted to stand, would provide a precedent that litigants cannot rely on a district court judge to safeguard the fair conduct of his own proceedings.

Although the court of appeals sought to justify its holding on the basis that the removal statute bars "review" of the district court's October 13 order, it is precisely because remand orders are not reviewable that district court judges must have powers sufficient to insure that a full and fair opportunity for all parties to be heard is provided before issuance of such an order. The inherent powers of a court to control its own proceedings, to protect the litigants before it, and to do justice, are not as unreasonably circumscribed as the court of appeals' decision would suggest.

Both the Federal Rules of Civil Procedure and case law recognize a federal court's inherent power to control the proceedings before it to the end that justice is done. *See, e.g.*, Fed. R. Civ. P. 1, 60.

> "[A]s has been many times declared by this court, the equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise. . . ." *Gumbel* v. *Pitkin*, 124 U.S. 131, 145-46 (1888).

See also Boaz v. *Mutual Life Insurance Co.*, 146 F.2d 321 (8th Cir. 1944) (a court has "inherent power to correct its error"). Rule 60 of the Federal Rules of Civil Procedure particularly reflects these inherent powers and expressly authorizes the federal courts to exercise them in appropriate circumstances. Rule 60(b) thus provides in pertinent part:

> "[T]he court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, . . .; (4) the judgment is void . . .; or (6) any other reason justifying relief from the operation of the judgment." (Appendix D at A26-27.)*

Reliance by a litigant upon a court's own assurances regarding the litigant's opportunity to be heard on an important issue is an appropriate circumstance for a court to exercise its equitable powers. Similar reliance has been

* Even when the order in question is not considered final, the court has inherent power to provide the same relief. "Despite the fact that Rule 60(b) was generally thought to cover the field, the inherent power of courts to set aside and reconsider interlocutory orders was nevertheless held not to be precluded or limited by the rule." *United States* v. *Jerry*, 487 F.2d 600, 605 (3d Cir. 1973); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

protected in numerous contexts. For example, in *Fidelity & Deposit Company of Maryland* v. *USAFORM Hail Pool, Inc.*, 523 F.2d 744 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976), the district court was held to have validly vacated and reentered a judgment to permit an otherwise time-barred appeal because the court had assured counsel that he would receive notification at the proper time of the entry of judgment. *Accord, Smith* v. *Jackson Tool & Die, Inc.*, 426 F.2d 5 (5th Cir. 1970). *See also Ellis* v. *United States*, 416 F.2d 791 (D.C. Cir. 1969) (reliance on an unauthorized grant of judicial immunity protects a witness from prosecution on the basis of his testimony); *cf. Martindell* v. *International Telephone & Telegraph Corp.*, 594 F.2d 291, 296 (2d Cir. 1979) (witnesses' reliance on court's protective order in civil proceeding prevents government access to witnesses' testimony). In short, just as the district court did in the case at bar, courts have frequently confirmed the legitimacy of litigants' expectations that reliance on judicial assurances as to conduct of court proceedings will not result in prejudice.

Corrective action pursuant to the federal courts' inherent powers to control their proceedings and protect against their own errors is especially appropriate when the order to be corrected is the result of a denial, whether inadvertent or otherwise, of a litigant's opportunity to be heard. As this Court recognized more than a century ago, such an order is a legal nullity:

> "A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.
>
> . . . .

> The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose." *Windsor* v. *McVeigh,* 93 U.S. 274, 277, 278 (1876).*

Moreover, denial of a right to be heard is clearly a basis for invoking Rule 60(b): "A judgment is void within the meaning of Fed. R. Civ. P. 60(b)(4) if the court rendering it acted in a manner inconsistent with due process of law." *Sonus Corp.* v. *Matsushita Electric Industrial Co.,* 61 F.R.D. 644, 649 (D. Mass. 1974); *see Hicklin* v. *Edwards,* 226 F.2d 410 (8th Cir. 1955); *Zaro* v. *Strauss,* 167 F.2d 218 (5th Cir. 1948).** This was precisely the kind of error

* This long-established doctrine—that where a court has acted without allowing a party to be heard a resulting order should be treated as void—has often been applied by the federal courts. For example, the Court of Appeals for the Tenth Circuit "vacated and held for naught" a district court dismissal where "the appellant was not given a fair opportunity to be heard. . . ." *Fleming* v. *Gulf Oil Corp.,* 547 F.2d 908, 913 (10th Cir. 1977). Similarly, in *Bass* v. *Hoagland,* 172 F.2d 205, 209 (5th Cir.), *cert. denied,* 338 U.S. 816 (1949), it was held that "a judgment, whether in a civil or criminal case, reached without due process of law is without jurisdiction and void. . . ." *See also Ursini* v. *Menninger Foundation,* 384 F. Supp. 158, 160 (E.D. Cal. 1974); *L.D. Reeder Contractors* v. *Higgins Industries, Inc.,* 265 F.2d 768 (9th Cir. 1959). The effect of such a judgment is also clear: "[a] [v]oid judgment is a legal nullity . . . ." *Graciette* v. *Star Guidance, Inc.,* 66 F.R.D. 424, 425 (S.D.N.Y. 1975); *Jordan* v. *Gilligan,* 500 F.2d 701 (6th Cir. 1974), *cert. denied,* 421 U.S. 991 (1975). The court of appeals found such cases cited by petitioners "inapposite," apparently because they raise the more common factual pattern of lack of notice rather than denial of an opportunity to be heard. (Appendix A at A8.) The right to be heard, however, not just the right to notice, is a vital component of fundamental fairness. Without an opportunity to be heard, notice is meaningless. *See* pp. 11-14 *supra.*

** Similarly, Rule 60(a) was held to apply where a court informed the parties it would see to it that an amended complaint was properly filed, but failed to do so. *Pattiz* v. *Schwartz,* 386 F.2d 300 (8th Cir. 1968). In *Blaine* v. *Peters,* 194 F.2d 887, 887 (D.C. Cir. 1952), it was held proper for a court to correct its error under Rule 60(a) where "[b]y inadvertence [a dismissal] motion was immediately denied."

the district court in this case conscientiously sought to remedy.

The record is clear, and it has not been questioned by the respondents or by the court of appeals, that petitioners delayed filing their papers in opposition to respondents' motion to remand in reliance upon a statement by the district court that those papers would not be due until further notice from the court. (App. 84-88 and pp. 5-8 *supra.*) Notwithstanding this assurance and without notice to petitioners, the district court entered its order of remand on October 13. The district court, thus having inadvertently overlooked its assurance and prevented petitioners from being heard, simply used its inherent remedial powers to rectify its mistake by recognizing formally that its prior order was null and void *ab initio.*

The court of appeals' basis for overturning the district court's remedial action was the provision in 28 U.S.C. § 1447(d) that a remand order "is not reviewable on appeal or otherwise . . . ." (*See* Appendix A at A5-6, and Appendix D at A26.) The significance of this rule of finality, however, was misunderstood by the court of appeals, which implicitly disapproved the district court's November 28 order as an improper "review" or "reconsideration."* To the contrary, on the undisputed record,

* The cases on which the court of appeals relied in finding that the district court lacked jurisdiction to enter its October 26 order all involved the question of whether district courts could reverse their decisions to remand cases to state courts because they had erred on the merits of the removal issue and not, as in the case at bar, whether a clearly prejudicial procedural error in entering a remand order could be remedied. *See Gravitt* v. *Southwestern Bell Tel. Co.,* 430 U.S. 723 (1977); *In re La Providencia Devel. Corp.,* 406 F.2d 251 (1st Cir. 1969); *Sullivan* v. *Simons,* 337 F.2d 239 (4th Cir. 1964); *Garrison* v. *Atlantic Life Ins. Co.,* 18 F. Supp. 469 (E.D.S.C. 1937).

that order was the result of the court's first consideration of the remand matter with the full record, including petitioners' legal and factual positions, before it. In fact, the finality of district court decisions on remand provided for by section 1447(d) is a most compelling reason to ensure that such a final decision is reached in a manner that protects the rights of the parties, including the right to rely on assurances of the court relating to the court's proceedings.* This is exactly what the district court's order of October 26 was designed to accomplish.

In short, the assurance of the court justified petitioners' forbearance in not filing their papers. Likewise, the district court properly exercised its remedial powers to protect petitioners' reliance on that assurance. Accordingly, the court of appeals' decision is an obvious departure from established principles of law which clearly warrants relief from this Court in the exercise of its supervisory power over the federal judiciary. Without such relief, a serious and unwarranted intrusion into the district court's power to control its own proceedings and to protect the litigants before it will be allowed to stand, resulting in injustice to petitioners and a dangerous precedent for the future.

* Although the facts of this case amply demonstrate the impropriety of the court of appeals' holding, a further illustration of the court's mistaken logic serves both to confirm its error and presage the possible consequences of allowing such a precedent to stand. Thus, under the court of appeals' reasoning, a party would be totally without recourse in the district court in the event that the court granted a remand motion prior to the filing of opposing papers where such papers were not yet due under a local court rule.

3. The court of appeals improperly expanded the scope of appellate review in a mandamus proceeding by rejecting the undisputed factual finding of the district court that its remand order was inadvertently entered and by substituting its own *de novo* findings.

The October 26 order of the district court was based expressly on the factual finding that its prior order of October 13 had been entered "by mistake and inadvertence." As the record indicates, the "inadvertence" referred to was the district court's acknowledged failure to honor its previous assurance to petitioners that they would be given the opportunity to present their factual and legal positions on removal prior to the entry of a remand order. (App. 84-88; *see* pp. 5-8 *supra*.)

The court of appeals, assuming jurisdiction over an admittedly non-appealable order by way of writ of mandamus,* disregarded the district court's undisputed finding

* The very assumption of jurisdiction by way of mandamus was improper because there was no "really extraordinary cause" for which appeal was "a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 260 (1947). Indeed, the situation presented here is similar to that in *Ex parte Park Square Automobile Station*, 244 U.S. 412 (1917), where a court's ruling on a motion to remand was said to be based on a "clearly erroneous construction" of the removal statute, thus making the case an "exceptional" one. This Court disagreed and dismissed the mandamus petition:

> "[H]owever grave may be the inconvenience arising in this particular case from the construction which the court gave to the statute and upon which it based its assertion of jurisdiction, greater inconvenience in many other cases would necessarily come from now departing from the established rule and reviewing the action of the court by resort to a writ of mandamus in-

(footnote continued on next page)

of inadvertence and substituted its own *de novo* finding that "the order of October 13, 1978, cannot properly be characterized as one inadvertently entered." (Appendix A at A7.) The court of appeals arrived at its *de novo* finding by ignoring the factual basis of the district court's decision. The district court found that its October 13 order had been entered inadvertently in that it had overlooked an assurance made to petitioners' counsel that their position could be presented at a later date. But the court of appeals looked only to the order itself and held that there had been no "inadvertence" since the district court had actually intended to enter the order in question.

Petitioners respectfully submit that the district court's factual finding of inadvertence was entitled to respect, especially because here the district judge was peculiarly best situated to appraise the facts, since he was personally involved in the circumstances which gave rise to his corrective order. In substituting its own finding for that of the district court, the court of appeals violated the long-settled principle that "the function [of appellate courts] is not to decide factual issues *de novo.*" *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). The court of

stead of leaving the correction of the error to the orderly methods of review established by law." *Id.* at 416.

Where there is a colorable argument supporting a district court's jurisdiction, mandamus does not lie to review the jurisdictional question. *General Tire & Rubber Co.* v. *Watkins*, 326 F.2d 926, 928 (4th Cir.), *cert. denied*, 377 U.S. 909 (1964); *Stein* v. *Collinson*, 499 F.2d 91 (8th Cir. 1974); *Holub Industries, Inc.* v. *Wyche*, 290 F.2d 852 (4th Cir. 1961); *Comfort Equipment Co.* v. *Steckler*, 212 F.2d 371 (7th Cir. 1954). *See also, Belcher* v. *Grooms*, 406 F.2d 14 (5th Cir. 1968) (no mandamus to review district court's holding that federal diversity jurisdiction existed).

appeals thus refused to accept its proper role which was described, for example, by the Third Circuit in *Krasnov* v. *Dinan*, 465 F.2d 1298, 1302 (3d Cir. 1972), a case in which the district court had made a finding that diversity jurisdiction existed:

> "It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supporting evidentiary data. Unless the reviewing court establishes the existence of either of these factors, it may not alter the facts found by the trial court."*

Similarly, the court of appeals was not entitled to substitute its own findings in place of the district court's conclusion that its inadvertence had denied petitioners their "opportunity . . . to be heard." (Appendix B at A10.) Thus in a closely analogous case, *Lohman* v. *General American Life Insurance Co.*, 478 F.2d 719 (8th Cir.), *cert. denied*, 414 U.S. 857 (1973), a district court, also acting under Rule 60(b)(4), found its prior order of dismissal void "because, under the circumstances of the case, the dismissal was tantamount to a denial of due process of law." *Id.* at 723. In reviewing the district court's action, the Eighth Circuit held:

> "It is not our task in this case to consider anew whether or not the former order of dismissal was tan-

* *See, e.g., Morgan* v. *United States*, 399 F.2d 93 (5th Cir.), *cert. denied*, 393 U.S. 1025 (1969) (appellate court will not reverse determination of trial court as to whether the fairness of the proceeding was prejudiced by juror misconduct unless the conclusion is clearly erroneous).

> tamount to a violation of due process but rather to ascertain whether or not the District Court abused its discretion in judging its former order void. The District Court clearly had power to grant relief under Rule 60(b). *The grant of relief involved an appraisal of the facts. Such an appraisal and grant of relief are largely within the discretion of the trial court.*" *Id.* at 724 (emphasis added) [citations omitted].*

In contrast, the court of appeals gave no weight at all to this finding by the district court. Rather, the court of appeals simply noted that petitioners had been served with respondents' motion to remand and had referred to that motion in their own motion for a stay. The Fourth Circuit then erroneously concluded that "[i]t is clear that the defendants had an opportunity to voice their opposition to the remand motion . . . ." (Appendix A at A8.) Ignoring

* Courts of appeals have held in various contexts that a "clearly erroneous" standard is to be applied to factual determinations by a district court concerning denials of due process. For example, in *United States ex rel. Marino* v. *Rundle,* 464 F.2d 149, 149 (3d Cir. 1972), the Third Circuit applied this standard to a due process finding concerning the use of voice identification procedures:

> "[o]ur standard of review of those findings is carefully circumscribed and the District Court's factual determinations will not be set aside unless 'clearly erroneous.' See Fed. R. Civ. P. Rule 52(a), United States v. Archie, 452 F.2d 897 (3d Cir. 1971); Andrews v. Chemical Carriers, 457 F.2d 636 (3d Cir. 1971)."

See also, Olshock v. *Village of Skokie,* 541 F.2d 1254 (7th Cir. 1976).

District court findings concerning other constitutional rights violations have similarly been tested by this stringent standard. *United States* v. *Flickinger,* 573 F.2d 1349 (9th Cir.), *cert. denied,* 439 U.S. 836 (1978) ("clearly erroneous" was the proper standard of review of finding that exigent circumstnaces justified warrantless arrest in a residence); *Grausam* v. *Murphey,* 448 F.2d 197 (3d Cir. 1971), *petition for cert. dismissed,* 405 U.S. 981 (1972) (finding of fact concerning first amendment violation must be upheld unless "clearly erroneous").

the district court's finding thus led the court of appeals to the unsupportable conclusion that an opportunity to be heard exists even where a litigant postpones submittal of its papers in reliance on the district court's assurances, with the result that it is not heard at all.

Petitioners urge this Court to accept this petition for writ of certiorari and correct this improper exercise of appellate jurisdiction.

Conclusion

For all the reasons set forth above, a writ of certiorari should issue to review the opinion and judgment of the Court of Appeals for the Fourth Circuit.

Dated: December 27, 1979

Respectfully submitted,

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Appendices

APPENDIX A

Opinion of the United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-1896

THREE J FARMS, INC., U. S. TEXTILE CORPORATION, SHAPIRO & SON BEDSPREAD CORP. and TROY H. CRIBB & SONS, INC., in behalf of themselves and all other parties similarly situated and circumstanced,

Appellants,

versus

ALTON BOX BOARD CO.; CONTAINER CORPORATION OF AMERICA; HOERNER WALDORF CORP.; INLAND CONTAINER CORP.; ST. JOE PAPER CO.; ST. REGIS PAPER CO.; STONE CONTAINER CORP.; TIM POFFENBARGER; ENNIS MCCARTER; WESTVACO CORP.; BOISE CASCADE CORP.; CHAMPION INTERNATIONAL, INC.; THE CHESAPEAKE CORP. OF VIRGINIA; CONSOLIDATED PACKAGING CORP.; THE CONTINENTAL GROUP, INC.; CORCO, INC.; CROWN-ZELLERBACH CORP.; DIAMOND INTERNATIONAL CORP.; DURA-CONTAINERS, INC.; FIBERBOARD CORP.; GEORGIA-PACIFIC CORP.; GREEN BAY PACKAGING, INC.; INTERNATIONAL PAPER CO.; INTERSTATE CONTAINER CORP.; LONGVIEW FIBRE CO.; MACMILLAN BLOEDEL, INC.; MACMILLAN BLOEDEL CONTAINERS, INC.; MENASHA CORP.; OLINKRAFT, INC.; OWENS-ILLINOIS, INC.; PACKING CORP. OF AMERICA; POTLATCH CORP.; SOUTHWEST FOREST INDUSTRIES, INC.; UNION CAMP CORP.; U. S. CORRUGATED FIBREBOX CO.; WESTERN KRAFT EAST, INC.; WEYERHAEUSER; WILLIAMETTE INDUSTRIES; THE FIBRE BOX ASSN., an unincorporated association; and "John Doe" and "Richard Roe", the names "John Doe" and "Richard Roe" being fictitious; the parties intended being those parties who participated in the unlawful act alleged herein,

Appellees.

Appendix A

Appeal from the United States District Court for the District of South Carolina, at Spartanburg. Robert F. Chapman, District Judge.

Argued: May 9, 1979 Decided: November 9, 1979

Before FIELD, Senior Circuit Judge, and WIDENER and HALL, Circuit Judges.

Robert L. Stoddard (Moore, Stoddard & Stoddard on brief) for Appellants; Thomas G. Slater, Jr. (Ray V. Hartwell, III, Edgar M. Roach, Jr., Hunton & Williams on brief) for Appellees.

FIELD, Senior Circuit Judge:

Commencing in March of 1977, in the wake of a federal grand jury investigation in the Southern District of Texas, a number of actions were filed in various federal courts throughout the country against corrugated container manufacturers, including all of the defendants in the present case, alleging that they had violated Section 1 of the Sherman Act, 15 U.S.C. § 1, over an eighteen year period by engaging in a nationwide conspiracy to fix the prices of their products. After some 37 civil actions had been filed, a motion was made before the Judicial Panel on Multidistrict Litigation to consolidate all of the cases in one judicial district, and on November 29, 1977, the Panel transferred the cases to the Southern District of Texas. Thereafter, vir-

Appendix A

tually all of the class plaintiffs amended their several complaints by adopting a single Unified and Consolidated Complaint. Additionally, a nationwide class of all persons who had purchased containers or other corrugated products from any defendant, including any subsidiary or affiliate, at any time during the period from January, 1960, to January 25, 1978, was certified in the multidistrict litigation. Thereafter, on June 30, 1978, the plaintiffs in the present case, who concededly are members of the class certified in the multidistrict litigation, filed this action in the state court in Spartanburg County, South Carolina, based upon the antitrust provisions of the South Carolina Code, §§ 39-3-10, *et seq.* (1976).

On July 31, 1978, the defendants removed the case to the United States District Court for the District of South Carolina, and on August 16, 1978, the plaintiffs filed a motion to remand to the state court, charging that there was neither federal question nor diversity jurisdiction. On August 29, 1978, the defendants filed a motion for a stay of further proceedings, or extending the defendants time to respond to plaintiffs motion to remand until the Multidistrict Panel acted upon motions pending in the Texas litigation. On October 13, 1978, the district judge entered an order in which he found, *inter alia,* that there was no federal question jurisdiction nor complete diversity of citizenship between the parties and, accordingly, granted the motion to remand the case to the state court. The district judge also denied the defendants' motion for a stay, stating that his consideration of the removal issue with respect to subject matter jurisdiction was not dependent upon any proceedings in the multidistrict litigation. Pursuant to this

order, the original pleadings and a certified copy of the docket entries were forwarded to the clerk of the state court.

On October 23, 1978, the defendants filed a motion asking that the remand order of October 13th be held invalid because the defendants had inadvertently been denied the opportunity to argue in opposition to the plaintiffs' motion to remand. Following a hearing on this motion, on October 26, 1978, the court entered an order which stated that the order of October 13th had been entered "by mistake and inadvertence" and declared it to be null and void. The clerk of the court was directed to deliver a copy of the order to the clerk of the state court "and to retrieve the file mistakenly returned to that Court." Pursuant to the directions of the court, the defendants filed a memorandum in opposition to the remand and on November 29, 1978, the district judge entered an order in which he reviewed the case at some length and denied the remand to the state court. From this action of the district court the plaintiffs have appealed.

The defendants have asked that we dismiss this appeal on the ground that the district court's order of November 28, 1978, denying remand is neither a final decision nor an interlocutory order of such a nature that an immediate appeal may be taken. It is, of course, beyond question that an order of a district court denying a motion to remand, standing alone, is not a final order appealable under 28 U.S.C. § 1291. *Aberle Hosiery Co.* v. *American Arbitration Ass'n.*, 461 F.2d 1005, 1006 (3 Cir. 1972); *Capital Bancshares, Inc.* v. *North American Guar. Ins. Co.*, 433 F.2d 279, 282 (5 Cir. 1970). However, while we have no direct appellate jurisdiction in such a case, we may, nevertheless, treat this appeal as a petition for a writ of mandamus.[1] *Young Properties Corp.* v. *United Equity Corp.*, 534 F.2d 847, 854 (9 Cir. 1976); *Kasey* v. *Molybdenum Corporation of America*, 408 F.2d 16 (9 Cir. 1969); *International Products Corporation* v. *Koons*, 325 F.2d 403 (2 Cir. 1963). We recognize, of course, that we should proceed with caution in using the writ of mandamus when a direct appeal is prohibited, and should resort to such a jursidictional basis only under compelling circumstances. We think, however, the circumstances of the present case are of such a nature that we should draw upon our authority under the "all-writs" statute, 28 U.S.C. § 1651, and exercise our power of mandamus to review the action of the district court.

We do not address ourselves to the district court's appraisal of the jurisdictional questions in either of its orders for in our opinion the entry of the order of remand on October 13, 1978, divested the district court of all jurisdiction in this case and precluded it from entertaining any further proceedings of any character, including the defendants' motion to vacate the original remand order. *See Garrison* v. *Atlantic Life Ins. Co.*, 18 F.Supp. 469 (E.D.S.C. 1937). The prohibition against further consideration of the remand order is found in the plain language of 28 U.S.C. § 1447(d) which commands that an order "remanding a case to the state court from which it was removed is not reviewable on appeal *or otherwise* * * *." (Emphasis added) This pro-

1. At oral argument, counsel for the defendants graciously agreed that if we determined that this appeal should be treated as a petition for mandamus they would waive the procedural formalities incident to such treatment.

scription against review was recognized by the Court in *Gravitt* v. *Southwestern Bell Tel. Co.,* 430 U.S. 723 (1977), and by our court in *Sullivan* v. *Simons,* 337 F.2d 239 (4 Cir. 1964). Unquestionably, the statute not only forecloses appellate review, but also bars reconsideration of such an order by the district court. In the case of *In re La Providencia Development Corporation,* 407 F.2d 251 (1 Cir. 1969), the district court had reconsidered its remand order and entered a second order purporting to vacate the remand. In granting a writ of mandamus, the court observed that "there is no more reason for a district court being able to review its own decision, and revoke the remand, than for an appellate court requiring it to do so. Both are foreclosed; nothing could be more inclusive than the phrase 'on appeal or otherwise.' " *Id.* at 252-253. The underlying rationale was stated by the court as follows:

> "Removal in diversity cases, to the prejudice of state court jurisdiction, is a privilege to be strictly construed, * * * and the state court proceedings are to be interfered with once, at most. This is not only in the interest of judicial economy, but out of respect for the state court and in recognition of principles of comity. The action must not ricochet back and forth depending upon the most recent determination of a federal court."

Id. at 252.

The defendants do not question the principles enunciated in these cases, but contend that the review of errors committed in connection with the entry of a remand order

which are unrelated to the standards of 28 U.S.C. § 1447(c)[2] is permitted, and rely upon *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U.S. 336 (1976) as support for this argument. In *Thermtron,* the Court, noting that § 1447(c) provides for a remand when the district court determines that "the case was removed improvidently and without jurisdiction," held that a review was not foreclosed where the district court had remanded "on grounds wholly different from those upon which § 1447(c) permits remand." *Id.* at 344. Unlike *Thermtron,* in the present case, the district court, in its order of October 13, 1978, clearly determined that there was an absence of federal jurisdiction and, accordingly, that the case had been "removed improvidently." Since the order was plainly within the bounds of § 1447(c), it was immune to review by a court of appeals or reconsideration by the district court itself.

Whether a district court has the authority to vacate a remand order which was entered by "mistake and inadvertence" in the true sense of that phrase is a question we need not decide for it is clear that the order of October 13, 1978, cannot properly be characterized as one inadvertently entered. As we have noted, the order indicates that the court had carefully considered the jurisdictional questions and reached the conclusion that the case should be remanded to the state forum. Counsel for the defend-

2. 28 U.S.C. § 1447(c) reads as follows:

> (c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

ants, however, urge upon us that the original remand order was properly vacated because their "due process right to be heard had been inadvertently denied." We find nothing of such constitutional dimensions in this case. The plaintiffs motion to remand was properly served upon counsel for the defendants, and thereafter the defendants filed their motion to stay the proceedings. The memorandum in support of this motion referred to the motion to remand and pointed out to the district court the impact a remand would have upon the Texas litigation. It is clear that the defendants had an opportunity to voice their opposition to the remand motion, and their failure to do so, whether due to the court's inadvertence or otherwise, does not, in our opinion, raise any constitutional question. The cases cited by the defendants on this point are inapposite, *e.g., Fleming* v. *Gulf Oil Corporation,* 547 F.2d 908 (10 Cir. 1977), and *Bass* v. *Hoagland,* 172 F.2d 205 (5 Cir. 1949). *Fleming* involved a judgment of dismissal which had been entered on the *ex parte* motion of a defendant and in which judgment was entered without any notice whatever to the plaintiff. Similarly, *Bass* dealt with a default judgment in which the notice required by Rule 55(b)(2), Fed.R.Civ.P., had not been given to the opposing party.

Since we conclude that the district court lacked jurisdiction to vacate the original order of remand, a writ of mandamus is appropriate in this case, for "traditional use of the writ in aid of appellate judisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction * * *." *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 26

(1943). *See Thermtron Products, Inc.* v. *Hermansdorfer, supra,* 423 U.S. at 352-353. Accordingly, this case is remanded to the district court with instructions to return this case, together with all appropriate pleadings and papers, to the Court of Common Pleas of Spartanburg County, South Carolina.[3]

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3. In his order of November 29, 1978, the district judge referred to certain conduct of counsel for the plaintiffs which had occurred subsequent to his order of October 13, 1978, and indicated that the attorneys were using the state litigation to "harass the defendants." Having divested itself of jurisdiction by the original remand order, the district court had no continuing supervisory authority over the conduct of counsel, nor was any such conduct an appropriate basis for vacation of the remand. We might add that if, in fact, the plaintiffs were using the state litigation in an improper manner, we have every confidence that the South Carolina Court has the authority and judicial resourcefulness to deal with such a problem.

APPENDIX B

Order of October 26, 1978 of the United States District Court for the District of South Carolina

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Civil Action No. 78-1257

Three J Farms, Incorporated; U. S. Textile Corporation; Shapiro & Son Bedspread Corporation; and Troy H. Cribb & Sons, Inc., in behalf of themselves and all other parties similarly situated and circumstanced,

Plaintiffs,

vs

Alton Box Board Company, *et al.*,

Defendants.

It appearing to the Court that the Order of October 13, 1978 was entered by mistake and inadvertance [*sic*] without the opportunity for the defendants to be heard on the issues relating to plaintiffs' motion to remand this action to the Court of Common Pleas for Spartanburg County, South Carolina:

IT IS HEREBY ORDERED that this Court's Order of October 13, 1978 is hereby declared to have been null and void as of the date of issue; and

Appendix B

IT IS FURTHER ORDERED that the Clerk of this Court is hereby directed to deliver a copy of this Order to the Clerk of the Court of Common Pleas for Spartanburg County, South Carolina, and to retrieve the file mistakenly returned to that Court; and

IT IS FURTHER ORDERED that defendants shall file and serve on or before November 6, 1978 their opposition to plaintiffs' motion to remand this action to the Court of Common Pleas for Spartanburg County, South Carolina; and

IT IS FURTHER ORDERED that plaintiffs shall file and serve on or before November 16, 1978 any papers in reply thereto; and

IT IS FURTHER ORDERED that oral argument may be had on this matter at a date to be set in accordance with this Court's schedule, if the Court determines such argument will be helpful after a study of the briefs.

AND IT IS SO ORDERED.

/s/ ROBERT F. CHAPMAN

ROBERT F. CHAPMAN
UNITED STATES DISTRICT JUDGE

October 26, 1978
Columbia, South Carolina

TRUE COPY
Test:
MILLER C. FOSTER, JR. CLERK
/s/ TANYA CARSON

By: Deputy Clerk

APPENDIX C

Opinion and Order of November 28, 1978 of the United States District Court for the District of South Carolina

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Civil Action No. 78-1257

Three J Farms, Incorporated, *et al.*,
Plaintiffs,

vs

Alton Box Board Company, *et al.*,
Defendants.

This action is before the Court upon plaintiffs' motion to remand the case to the Court of Common Pleas for Spartanburg County, South Carolina. In a previous order dated October 13, 1978, the matter was remanded to the State Court, but this Order was declared null and void by an Order filed October 26, 1978, when the Court realized that it had not received or considered the defendants' brief in opposition to the motion to remand.

By the terms of the October 26, 1978 Order the defendants were given until November 6 to file their brief in

opposition to remand and the plaintiffs had until November 16 to file any reply. These briefs together with the exhibits attached thereto have now been received and carefully considered. The Court finds, for the reasons hereinafter set forth, that the motion to remand must be denied.

The plaintiffs Three J Farms, Incorporated, U. S. Textile Corporation and Troy H. Cribb and Sons, Inc. are South Carolina corporations and the plaintiff Shapiro & Son Bedspread Corporation is a New York corporation. These plaintiffs instituted this antitrust action in the Court of Common Pleas for Spartanburg County, South Carolina, on June 30, 1978. The action was removed to this court on July 31, 1978. The defendants Tim Poffenbarger and Ennie [*sic*] McCarter are citizens and residents in the State of South Carolina. The remaining 36 defendants are corporations with their principal place of business and place of incorporation in states other than South Carolina and it is alleged that said corporate defendants are either qualified to do business in the State of South Carolina or own property and transact business within the State of South Carolina so as to be subject to the jurisdiction of the State Court.

The complaint alleges that the suit is a class action brought under §15-5-50 of the Code of Laws of South Carolina 1976 and seeks to establish a class made up of all purchasers of corrugated containers from any of the defendants herein who are located in the State of South Carolina and who purchase such corrugated containers from a period commencing prior to 1960 and continuing to the present time, and also purchasers of corrugated containers who have utilized such corrugated containers in connection with any trade or business located within the State of South

Carolina. The complaint further alleges that the defendants at some time prior to 1960 and continuing until the present date violated §39-3-10 of the Code of Laws of South Carolina, which is the state antitrust law, by various agreements which lessened the full and free competition of prices in the sale of corrugated containers, agreements relating to the importation or sale of the articles imported into the State of South Carolina which were made with the view to lessen or which tended to lessen full and free competition and entered into agreements and combinations which were designed to and tended to control the price or the cost to the consumer of corrugated containers. The plaintiffs seek damages in the amount of two hundred million dollars.

Since the Order of October 13, 1978, the factual background of the Corrugated Container Antritrust Litigation has been made available to the Court. This litigation began as a result of a Federal Grand Jury investigation in the Southern District of Texas, Houston Division in late 1975. This investigation became public knowledge in 1976 and by March of 1977 the first antitrust damage case was brought in Federal Court. This was followed by a number of additional class actions, as well as individual suits, brought in Federal Courts in other states. In January 1978 two indictments were returned against 14 corporations and 26 individuals as a result of the Grand Jury action in the Southern District of Texas. The criminal case is scheduled for trial beginning January 8, 1979 before the Honorable John V. Singleton, Jr.

Since all of the cases brought in the Federal Courts alleged violations of §1 of the Sherman Act (15 U.S.C. 1)

covering an 18 year span and resulting from an alleged nationwide conspiracy to fix prices of corrugated containers, the Judicial Panel on Multidistrict Litigation transferred the 37 civil cases then pending to the Southern District of Texas. In re Corrugated Container Antitrust Litigation, 441 F.Supp. 921 (J.P.M.L. 1977). All similar cases which have been filed since the panel's decision of November 29, 1977 have been transferred to the Texas court. In its decision to transfer all of the corrugated container private antitrust cases to the Southern District of Texas for coordinated and consolidated pretrial proceedings, the Multidistrict Panel called attention to the Federal Grand Jury investigation then underway in the Southern District of Texas and the 1.5 million documents and more than 100 witnesses who had been produced for the Grand Jury.

After the transfer to the Southern District of Texas the plaintiffs moved to amend their separate complaints by adopting a single Unified and Consolidated Complaint, which is now being used for all plaintiffs in the private antitrust cases against the corrugated container manufacturers. The Texas court also certified a class of plaintiffs made up of "all persons in the United States . . . who purchased corrugated containers or corrugated sheets from any defendant, or any subsidiary or affiliate of any defendant, at any time during the period from January 1, 1960 to January 25, 1978." Obviously, the present plaintiffs Three J Farms, Incorporated, U. S. Textile Corporation, Shapiro & Sons Bedspread Corporation and Troy H. Cribb and Sons, Inc. are already members of the class in the Texas

cases and had been members of the class at the time they commenced the present action.

The facts alleged by the present plaintiffs are almost identical to those set forth in the Unified and Consolidated Complaint in the Texas case, hereinafter M.D.L. No. 310. The corporate defendants in the present case are also defendants in M.D.L. No. 310 and the class which the present plaintiffs wish to represent are members of the class which has already been certified in Texas.

It is obvious that the present plaintiffs are making a determined effort to prevent their action from being consolidated for pretrial proceedings with the other cases arising out of the same facts and allegations. The plaintiffs contend that they prefer to litigate under the South Carolina antitrust law because of the difference in damages allowable. Rather than treble damages under the Sherman Act, plaintiffs in South Carolina would be entitled to a return of the full purchase price if they were successful in proving the antitrust violations. If the present plaintiffs wish to pursue their rights under the South Carolina antitrust law and the damages included therein, this could be included as a pendent claim in their federal proceeding, and this would not require a duplication of efforts in pretrial discovery proceedings nor would it justify the cost, waste of judicial time and other complications attendant to discovery proceedings in South Carolina separate from those being conducted in M.D.L. No. 310.

The Court is greatly concerned by facts which have occurred since its Order of October 13, 1978, because these actions raise a serious question as to whether the desire to return to the South Carolina State Court is for the benefit of the South Carolina plaintiffs or for the benefit of their attorneys. The plaintiffs are already members of the class in M.D.L. No. 310 and all of the corporate defendants are before the bar of justice in the Southern District of Texas. The transfer of all cases to the Texas court is not for trial but only for coordinated and consolidated pretrial proceedings. Following this Court's Order of October 13, 1978, the plaintiffs' attorneys, in an ex parte proceeding, obtained a temporary restraining order and a rule to show cause from a South Carolina circuit judge, who was then presiding in Spartanburg, enjoining the defendants, their officers, agents, attorneys or employees ". . . from preparing, disseminating or utilizing any settlement document in connection with any action pending in any court wherein such settlement document contains any release of any antitrust claims under the laws of the State of South Carolina without the prior approval of this Court." If this Order were to stand it would restrain any settlement negotiations conducted in the United States District Court in M.D.L. No. 310. It would be impossible for the Texas court to effectively manage the pretrial proceedings, and possible settlements that may occur along the way, without checking with the South Carolina Circuit Judge then presiding in Spartanburg County.

However, two other actions by the plaintiffs' attorneys taken after October 13, 1978 shocked the conscience of the Court. On October 20, before this Court set aside the Order of October 13, plaintiffs' attorney served upon the

defendants in the State Court proceeding certain discovery requests which obviously duplicate the discovery being taken in M.D.L. No. 310. In addition to numerous other documents the plaintiffs demand production of:

2. All documents delivered by any of the defendants to any Court, Governmental Agency or Grand Jury in connection with any civil or criminal antitrust proceeding or investigation relating to or concerning corrugated containers from 1960 to the present.
3. All documents delivered to the Court, to any of the plaintiffs' counsel, or contained in any document depository relating to or concerning the corrugated container antitrust litigation docket M.D.L. 310.
4. All transcripts of testimony of any person in the possession of any of the defendants or their officers, attorneys, agents, directors or employees which were taken in connection with any civil court proceedings, criminal court proceeding or governmental or private investigation relating to or concerning any antitrust claims involving corrugated containers from 1960 to the present.

As pointed out by the Multidistrict Panel, in deciding to transfer the various corrugated container antitrust actions to the Southern District of Texas, approximately one and a half million documents had been presented to the Grand Jury at the time of the Multidistrict Panel's decision in November 1977, and as of that date the indictment had not been handed down in the criminal proceeding.

What the plaintiffs' attorneys obviously wish to do is sit in South Carolina and have copies of all depositions,

documents and exhibits produced and developed in M.D.L. No. 310 packaged and mailed to them so they may share the benefits of the Texas proceedings without any of the expenses or inconveniences. Such an action would put the defendants in an impossible position of running back and forth between the Texas and South Carolina courts producing the same documents and information in both places. This would destroy the effectiveness of the Judicial Panel on Multidistrict Litigation and for all practical purposes eradicate 28 U.S.C. 1407.

The intent of the plaintiffs' attorneys is also evidenced by the filing of another purported class action under the South Carolina antitrust law in the Court of Common Pleas for Spartanburg County, South Carolina immediately following the inadvertent issuance of this Court's Order of October 13, 1978. The same attorneys represent London Dry Ltd., "in behalf of itself and all other parties similarly situated and circumstanced", as plaintiff, against Amstar Corporation, North American Sugar Industries, et al as defendants. This case alleges the same basic facts as those cases which have been consolidated in the Eastern District of Pennsylvania by the Judicial Panel on Multidistrict Litigation in M.D.L. No. 201A known as In re Eastern Sugar Antitrust Litigation. This is a multidistrict class action which has been in litigation for more than three years.

The entire purpose of consolidated multidistrict litigation is to reduce the waste of money, manpower, judicial time and prevent more than one court from becoming involved in the web of pretrial proceedings necessary to this type of litigation.

If plaintiffs seriously wish to pursue their claim against the defendants, they would be much better off in the consolidated case M.D.L. No. 310, since it has been assigned to a court which is most familiar with the facts and the present status of the case, and it is best able to move the discovery and the pretrial proceedings at the fastest possible pace. This would be the most economical route for both the plaintiffs and the defendants, and it is the route favored by the Congress and the judiciary. Consolidation into M.D.L. No. 310 would not sacrifice the plaintiffs' right to a trial in South Carolina and would not be an abandonment of the plaintiffs' claim to damages under the South Carolina law.

However, if plaintiffs wish to harass the defendants by requiring them to fight on two fronts, produce two sets of documents, endure discovery on the same issues in courts 1500 miles apart, all in the hope of obtaining a settlement from the defendants out of economic necessity, they may have chosen the right course of conduct, but unfortunately for them, they are before a Court which does not plan to cooperate in their venture.

Plaintiffs have gone to great pains to allege that their case is not federal in nature, but is brought solely under the law of South Carolina. In paragraph 7 of the complaint it is stated: "This complaint contains no charges of federal law violations." In spite of this disclaimer plaintiffs lift from the unified complaint in M.D.L. No. 310 entire paragraphs without any change of language or even punctuation.

On a motion to remand the Court must examine the true nature of plaintiffs' claim and not be led astray by generalizations in the pleadings or pronouncements as to what law should be applied. Such an examination leads this Court

to the inescapable conclusion that plaintiffs have set forth a cause of action under the Sherman Act and have used large portions of the allegations in the unified complaint to do so. In *Mountain Navigation Co., Inc.* v. *Seafarers, Int. Union of N. Amer.*, 348 F.Supp. 1298, 1302 (W.D.Wis. 1971) the Court stated:

> Once the plaintiff has asserted facts that form his complaint, he will be held to those facts and his characterization of his complaint will not defeat removal. The mere recitation of a statute will neither confer nor deprive a court of jurisdiction; only the facts pleaded may do this. . . .

The disclaimer of federal law contained in the complaint is not binding. There are numerous decisions that cases filed in state courts without reference to a federal statute applicable to the case or the facts does not prevent removal to the federal court where the main thrust of the complaint is federal in nature. See *Puerto Rico* v. *Sea-Land Service, Inc.*, 349 F.Supp. 964 (D.P.R. 1970); *Ulichny* v. *General Electric Co.*, 309 F.Supp. 437 (N.D.N.Y. 1970) and *Table Talk Pies of Westchester* v. *Strauss*, 237 F.Supp. 514 (S.D. N.Y. 1964).

The basic rule that plaintiffs are the masters of their complaint in setting forth the facts and choosing between two forums that may be equally accessible may be strictly construed in one-on-one litigation, but loses much of its force and persuasion under the facts of the present case, since plaintiffs are trying to make a choice that will greatly increase the cost of the litigation to all concerned, when there is a forum readily available, with a class already

certified which includes the plaintiffs, and with discovery already in progress and which will not need to be duplicated.

Even though South Carolina has an antitrust law, 39-3-10 et seq. South Carolina Code of Laws 1976, its application was limited many years ago to exclude activities having an effect upon interstate commerce. In 1905 the South Carolina Supreme Court in *State* v. *Virginia-Carolina Chemical Co.*, 71 S.C. 544, 51 S.E. 555 relating to the importation or sale of articles imported into the state was an illegal attempt by the state to exercise a prerogative that the Constitution had vested in the Congress of the United States to regulate interstate commerce. The Court found that the state had no power over the importation of articles of commerce.

Therefore any claim for damages resulting from the importation or the sale of imported corrugated containers is not a South Carolina claim, but purely a federal claim. This would include the plaintiff Shapiro since he was not located in South Carolina and in his affidavit affirms: "It is conceded, of course, that corrugated boxes involved in this complaint have been shipped by the defendants into South Carolina."

Even without this there is a very serious question as to Shapiro's position in the case and it appears obvious to the Court that Shapiro was made a party plaintiff in an attempt to defeat federal court jurisdiction. This finding is supported by the affidavit of Jerry Shapiro who stated in part:

> I respectfully point out that Shapiro and Son Bedspread Corp. and U. S. Textile Corporation are, in effect, a joint economic unit. The question as to which of these entities, or both of them, that are entitled to receive damages for violations of the state Anti-Trust Laws committed by the defendants is extremely complex. Since, however, both parties are involved in the same lawsuit this problem need not arise.

Bringing in an unnecessary party plaintiff does not simplify a lawsuit. No explanation is given by what Mr. Shapiro means by "a joint economic unit," but it is obvious that Shapiro is an unnecessary plaintiff and brought into the suit solely for the purpose of defeating federal court jurisdiction.

It is well settled that a plaintiff may not defeat a defendant's right to remove to the federal court by joining improper parties. *Wilson* v. *Republic Iron and Steel Co.*, 257 U.S. 92 (1921).

28 U.S.C. 1441(c) provides:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion may remand all matters not otherwise within its original jurisdiction.

The affidavit of the president of Troy H. Cribb & Sons, Inc. establishes that it has a separate and independent claim or cause of action. Cribb makes no claim against the individual defendant McCarter but in his supporting affidavit Cribb alleges that defendant Poffenbarger illegally conspired in quoting prices to Cribb & Sons. He asserts that

Poffenbarger is a necessary defendant in the action and has participated in part in the conspiracy of price fixing. It is also contended that Poffenbarger has been a representative of defendant Packaging Corporation of America from whom plaintiff Troy H. Cribb & Sons, Inc. purchased corrugated boxes involved in the price-fixing conspiracy and that Poffenbarger had made price quotations to Cribb which were effected [sic] by the conspiracy and that there was sufficient knowledge in the trade to show that Poffenbarger was aware of the conspiracy. Since Poffenbarger is an employee or agent of Packaging Corporation of America, another defendant in the action, and there is no claim that Poffenbarger acted independently of his employer, he cannot be held in the present action. See *State* v. *National Linen Service Corp.*, 225 S.C. 232, 315 S.E. 342 (1954). None of the plaintiffs have set forth any valid claim against Poffenbarger under the South Carolina law and his joinder was obviously for the purpose of attempting to defeat diversity.

Since plaintiff Troy H. Cribb & Sons, Inc. sets forth no claim against the South Carolina resident McCarter, and since it has no valid claim against the South Carolina resident Poffenbarger and the same is a separate and independent claim under 1441(c), it may be removed to the federal court, since it was subject to removal if sued upon alone. With the removal of the Cribb claim the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters not otherwise in its original jurisdiction. In view of the facts previously outlined in this Order the Court certainly will

not remand any portion of the case at the present time, since this is the type litigation that cries out for handling through the multidistrict procedure in order to prevent the chaos of allowing the present plaintiffs to duplicate the discovery now being conducted in Texas.

IT IS, THEREFORE, ORDERED that the motion to remand be and the same is hereby denied.

AND IT IS SO ORDERED.

/s/ ROBERT F. CHAPMAN

ROBERT F. CHAPMAN
UNITED STATES DISTRICT JUDGE

November 28, 1978
Columbia, South Carolina

TRUE COPY
Test:
MILLER C. FOSTER, JR. CLERK
/s/ TANYA CARSON

By: Deputy Clerk

APPENDIX D

Statutory Provisions and Rule Involved

28 U.S.C. § 1447(c), (d):

§ 1447. Procedure after removal generally

* * *

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Fed.R.Civ.P., Rule 60(b):

Rule 60. Relief from Judgment or Order

* * *

(b) Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been

discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.